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Nos. 02-1238, 02-1386, 02-1405

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents,

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents,

SOUTHWESTERN BELL TELEPHONE, L.P., *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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NEBRASKA CABLE COMMUNICATIONS ASSOCIATION'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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NEBRASKA CABLE COMMUNICATIONS ASSOCIATION'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Nebraska Cable Communications Association ("NCCA") respectfully submits this brief *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

NCCA is a non-profit corporation formed in 1971 for the purpose of promoting the development of the cable-television industry in Nebraska. NCCA currently has 13 member companies from across the State. These companies, which include both large urban cable operators and small rural operators, provide multichannel video programming service, high-speed Internet access, and various other services. NCCA participated in the litigation that resulted in a decision in which the Supreme Court of Nebraska, relying on the Eighth Circuit's decision that petitioners challenge here, held that Section 253 of the Communications Act, 47 U.S.C. § 253, pre-empts state statutes that prohibit municipalities from providing telecommunications services. *See In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 368-72 (Neb. 2003). NCCA participated in that litigation because its members, while generally welcoming competition, oppose unfair competition from the municipalities that regulate them.

ARGUMENT

The purpose of this brief is not to repeat the legal arguments made in the three well-crafted petitions that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its members has made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief. We have filed their consent letters with the Clerk of this Court.

have been filed (including one petition filed by a State and one by the Federal Government). Rather, the purpose of this brief is to underscore and illustrate the practical significance of the issues at stake from the perspective of firms that have experienced it first-hand.

So-called "municipal overbuilds" (communications networks built and operated by municipalities or municipally-owned utilities) are a familiar and growing phenomenon in the cable-television industry. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901, ¶ 13 (2002) ("Reports indicate that 450 public power systems offer communications services, up from 357 offering service last year."). The growth in the number of municipal systems appears to have accelerated during the past five years, as technological advancements have allowed overbuild networks to increase revenue by offering high-speed Internet service and telephony along with traditional cable-television service. *See, e.g.*, Dinesh Kumar, *Large Number of Municipal Utilities Eye the Broadband Market*, Comm. Daily, Apr. 1, 2003, at 3-4; Paula L. Stepankowsky, *Portland Phone Foray Could Spread*, Wall St. J., Mar. 12, 2003, at B9F; *Municipalities Seek Greater Role in Rural Broadband Rollout*, Comm. Daily, Jan. 16, 2002, at 5-6; David Armstrong & Dennis K. Berman, *Fighting City Hall: Telecom Companies Confront New Rival: the Municipal Network*, Wall St. J., Aug. 17, 2001, at A1.

It may well be that some of these networks are built out of a sincere desire to hasten the proliferation of broadband service in rural areas or to reap economies of scope between communications networks and already-existing electrical grids. *See, e.g.*, Michael Lafferty, *Small Towns Building Broadband Futures*, Communications Engineering and Design, Jan. 2001 <http://www.cedmagazine.com/

ced/2001/0101/id3.htm>; Matt Stump, *Kutztown, Pa., Muni Has Lots of Fiber*, Broadbandweek, Mar. 25, 2002 <http://www.opticalsolutions.com/articles/broadbandweek 032302.shtml>. But, even where that is true (and it is far from clear that it invariably is), there are severe drawbacks to public participation in potentially competitive markets.

Government entry into an industry that is in part privately owned inevitably gives rise to concerns about unfair competition. *See, e.g.*, Stephen G. Breyer, *Regulation and Its Reform* 183 (1982). In particular, government participation in private markets gives rise to concern about the two categories of anticompetitive misbehavior that have traditionally been of concern to utility regulators: "access discrimination" and "cross-subsidization." *See generally* William Baxter, *Antitrust Policy, reprinted in American Economic Policy in the 1980s* 601-04 (M. Feldstein ed. 1994). The former refers to a monopolist's refusal to allow non-discriminatory access to inputs necessary to production in an adjacent market. The latter refers to a monopolist's ability to subsidize its entry into a competitive adjacent market, allowing it consistently to undercut its rivals' rates.

As for access discrimination, local governments control access to public rights-of-way, a necessary input for any communications network. Based in part on their control of those rights-of-way, local governments have been allowed to exercise extensive regulatory oversight with respect to the cable industry. *See generally* 47 U.S.C. § 541, *et seq.* In particular, they hold authority to grant the licenses that cable operators need to provide service (so-called "franchises"), *see id.* § 541, may impose franchise fees, *see id.* § 542, may terminate franchises, *see id.* § 546, may block system sales, *id.* § 547, and may enforce consumer protection rules, *see id.* § 552.

Thus, as the FCC has acknowledged, "entry by municipalities into telecommunications may raise . . . questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor." *Public Utility Comm'n of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 190 (1997); Pet. App. in No. 02-1386 at 25a. That fear is well-grounded. *See generally* Pet. in No. 02-1405, at 4-5 (recounting municipalities' conduct in Missouri). In particular, municipalities have routinely taxed private cable operators while not imposing a commensurate burden on their own affiliates. *See, e.g.*, Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 Nw. U. L. Rev. 1099, 1117-18 (2001); Joe Estrella, *Ohio Bill Sets Overbuild Ground Rules*, Multichannel News, June 5, 2000 <http://www.multichannel.com/index.asp?layout=story_stocks&articleid=CA18638>.

Indeed, many municipal networks have their very origin in network facilities obtained from private firms as in-kind "taxation." Although federal law permits municipalities to charge cable operators and telecommunications carriers for use of public rights-of-way, federal law also sets certain limits. *See* 47 U.S.C. §§ 253(c), 542(b). Perhaps in part to evade these limits, municipalities have sometimes demanded that applicants provide various in-kind benefits, including network facilities. *See, e.g.*, Pet. in No. 02-1405, at 4 (recounting how municipalities often demand that, as a condition to use of public rights-of-way, firms contribute conduit or optical fiber); Paula L. Stepankowsky, *Portland Phone Foray Could Spread*, Wall St. J., Mar. 12, 2003, at B9F ("Portland got into the phone business [because it] owned a patchwork of physical assets

it had acquired through the cable-franchising process, such as conduit and unused fiber-optic lines.").

In addition to concerns about access discrimination, there are obvious concerns about cross-subsidization. "Most of the public fiber-optic systems are built by municipally owned electric utilities." *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1. Because many assets (including utility poles) are used simultaneously for both electric and telecommunications purposes, it is not difficult to misallocate costs to the electric side, thus in effect making captive ratepayers finance the network's ability to undercut telecom rivals' rates. *See Municipal Entry into the Broadband Cable Market*, 95 Nw. U. L. Rev. at 1113-16. At a minimum, municipalities possess the ability to issue tax-free bonds, thereby reducing their costs in a way that no private competitor can match. *See id.* at 1116-17.

In many other cases, however, cross-subsidization takes on a much less subtle form. Municipal networks generally operate at a loss. *See, e.g., Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1 (quoting University of Denver finance professor Ronald Rizzuto as saying: "'By and large, they all lose money.'"). Often, they receive an express subsidy either from the affiliated electric utility or simply from the public fisc. *See, e.g.*, Mitch Shapiro and Don Gall, *The New Economics of Overbuilds*, Broadband Markets <http://www.broadbandmarkets.com/articles/NewEconomics2.htm> ("municipal overbuilds . . . often enjoyed some level of subsidy from a local government or municipal utility"); *Municipalities Seek Greater Role in Rural Broadband Rollout*, Comm. Daily, Jan. 16, 2002, at 5-6 (quoting cable executive as saying: "'We were able to show that they [municipalities] were subsidizing cable with revenues from vital operations like electricity and water.' If municipalities are providing cheaper telecom service, they're doing it by raising fees for services such as water

and electricity, he said."); *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1 (municipal networks are "[f]unded in many cases by special municipal bonds and in others by cash generated by local utilities"); *id.* ("Tacoma Power funded Click! Network from a $100 million surplus generated from power sales to California and other states.").

Quite apart from concerns about anticompetitive conduct, the inefficiencies inherent in public ownership have been well chronicled. *See, e.g.*, N. Gregory Mankiw, *Principles of Microeconomics* 333 (2d ed. 2001) ("Put simply, as a way of ensuring that firms are well run, the voting booth is less reliable than the profit motive."); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 657 (3d ed. 2000) ("Often, government-owned firms are less efficient than privately owned firms. Managers have less of an incentive to maximize profits under public ownership.") (citations omitted); II Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 328 (1998) (noting "[t]he virtual disappearance" of government ownership as a policy prescription for industrial organization). Likely inefficiency is of legitimate concern to policymakers at the state level: ultimately, local tax- and ratepayers must shoulder the burden in the form of higher taxes or electricity rates.

Problems resulting from municipal ownership of communications firms are thus serious and widespread. It is precisely for that reason that States across the Nation have enacted statutes like the Missouri statute under review.[2]

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[2] *See* Pet. in No. 02-1238, at 12 n.4; Pet. in No. 02-1386, at 15 n.6; Pet. in No. 02-1405, at 10 n.10. Some of the States involved do permit municipalities to offer certain telecommunications-related services in which they do not compete directly with private firms. *See, e.g.*, Neb. Rev. Stat. Ann. § 86-575(1) (Michie Supp. 2002) (permitting municipalities to provide so-called "dark fiber").

The remedy chosen in such statutes — a ban on entry into potentially competitive markets (or "quarantine") — is hardly an unusual policy prescription to address problems of access discrimination and cross-subsidization. To the contrary, that remedy has been extensively employed by the Federal Government itself. *See, e.g.*, 47 U.S.C. § 271(a) (prohibiting Bell Companies from providing long-distance service); *id.* § 533(b) (repealed 1996) (prohibiting telephone companies from providing cable television service); 15 U.S.C. § 79i(a)(1) (prohibiting any utility holding company from owning interest in any other business); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (approving "Modified Final Judgment" prohibiting Bell Companies from providing long-distance service).

It is simply unlikely that the United States Congress intended to deprive the States of the option to employ a similar policy solution. That is particularly so when States routinely place a wide range of limitations on local government power.[3] It is implausible that Congress meant to single out one particular such limitation for pre-emptive treatment, yet did so without expressly mentioning it.

The decision of the Eighth Circuit is therefore mistaken. That decision not only interferes with sovereign States' ability to shape their internal distribution of governmental powers, but also threatens significant economic injury to their citizens. This Court should therefore grant review and reverse the Eighth Circuit's judgment.

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[3] Indeed, many States follow "Dillon's Rule," under which municipalities "have only those powers expressly granted by state law or necessarily implied from express powers." *Marcus Cable v. City of Bristol*, 237 F. Supp.2d 675, 678 (W.D. Va. 2002); *see also Municipal Elec. Auth. of Georgia v. Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399 (Ga. Ct. App. 1999).

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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